

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E055 00F 2024

KENNETH EDWINS GANDA -----

APPELLANT

VERSUS

MASH BUS COMPANY LTD-----1ST

RESPONDENT

PETER NGURU -----2ND

RESPONDENT

JUDGMENT

(Being an appeal from the decision of Wilson Rading PM, delivered vide CMCC No. 182 of 2011 on 9th May 2024)

1. The appellant filed a notice of motion application dated 4th October 2021, brought under the provisions of Section 1A, 1B and 3 of the Civil Procedure Act, Order 12, Rule 7, Order 51, Rule 3 of

the Civil Procedure Rules and all the enabling provisions of the law, seeking for orders:

a) That this Honourable Court be pleased to set aside the orders dismissing the plaintiff's suit on 6th December 2015 with costs on account of non-attendance by the plaintiff/applicant and their advocate.

b) That the plaintiff's suit herein be accordingly reinstated for hearing and determined on merits inter-parties.

c) That the costs of the application be provided for.

2. The application was based on the grounds thereto and an affidavit sworn by the plaintiff/applicant. He deposes that he instructed an advocate to file a suit on his behalf to secure damages in respect of injuries that he sustained in a road traffic accident on 13th May 2008.
3. That he is aware that the advocate accordingly filed the suit and undertook all the requisite proceedings

to facilitate the hearing and determination of the matter on merit. That subsequently his advocate was additionally engaged in some negotiations with the advocate for the respondent with a view to having the matter settled out of court but the negotiations were not finalized.

4. However, he lost touch with his advocate on record for a long time resulting into complete loss of communication and after successfully tracing the advocate on record, action was taken to confirm the position of the matter and he was informed by the said advocate that they were unable to locate the court file for a long time. That it was after such long search that it was confirmed that this matter was long dismissed for non-attendance.
5. However, the advocate was not aware at all that, this matter came up in court on the subject date and therefore would not have been able to notify him to attend court for hearing of the matter. The

applicant avers that failure to attend the court was not deliberate and is highly excusable. That considering the aforesaid, it shall be grossly unfair to condemn him and on the account of a mistake of his counsel.

6. Further that the application is made in good faith and that any prejudice suffered by the respondent can be compensated by costs if the application is allowed.
7. Furthermore, considering the sensitivity, nature and character of the suit being a serious road traffic accident, he'll be highly prejudiced if the orders sought herein are not given and prays that the same be given in the interest of justice.
8. However, the application was opposed by the respondent, vide grounds of opposition dated 2nd December 2021, wherein the respondents argues: -

- a) *As the record shows, the applicant is guilty of laches and inordinate delay, both in prosecution of the suit and bringing of the application.*
- b) *Equity does not aid an indolent litigant; hence the applicant is not entitled to exercise of the discretion of the court.*
- c) *The applicant has not specifically explained what they have been doing since the case was in court over six (6) years ago.*
- d) *Reinstatement of the said would be prejudicial to the defendants.*

9. The application was disposed of vide filing of submissions and upon considering the same it was dismissed with orders that each party meet their own costs.

10. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds: -

a) The Learned Trial Magistrate erred in law and in fact in dismissing the applicant's application dated 4th October 2021 when sufficient cause had been placed before him to determine otherwise as to have occasioned a travesty of injustice by denying the appellant the opportunity to be heard and have the suit determined on its merit.

b) The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the failure to appear in court on the date that the suit was dismissed was not deliberate or by own making of the appellant and subsequently reaching a wrong decision.

c) The Learned Trial Magistrate erred in law and in fact by considering issues and facts not placed before him and completely ignored the evidence by the appellant.

d) The Learned Trial Magistrate erred in law and in fact in applying law partially and thereby condemning the appellant unheard.

e) The Learned Trial Magistrate in his ruling manifestly erred by failing to consider and weigh the prejudice that the appellant would suffer by dismissing the suit as against the respondents thus arriving at a wrong conclusion.

f) The Learned Trial Magistrate misdirected himself to treating the facts and evidence before him superficially and consequently coming to a wrong conclusion on the same.

11. The appeal was disposed of vide filing of written submissions. The appellant in submissions dated 28th April 2025 argued that the main suit having not been heard and determined on its merits following its dismissal for non-attendance on 6th December 2013, the trial court unfairly dismissed his

application dated 4th October 2021, seeking reinstatement of his matter.

12. That considering the circumstances of the case including; the nature of claim, his efforts to move the matter forward, that the parties explored the possibility of a negotiated settlement, and that the failure to attend court was a mistake wholly on the part of the advocate, the trial court took the drastic step to dismiss his case.

13. The appellant submitted that the right to be heard is a cardinal principle and that courts have over time underscored the importance of affording parties all the possible opportunities to have matters determined on merit.

14. That there are rules that provide for dismissal of suits where parties exhibit exceeding tendency of absolute lack of interest in their matters or unnecessary delays but argued that courts have never hesitated to exercise their discretion and

bend backwards to create an opportunity for parties to be heard and cases determined on merits.

15. The appellant contends that while he may not have proffered sufficient and convincing reasons and/or grounds to warrant reinstatement of the suit, the record demonstrates that he pursued the matter with zeal, and taking into account the mistake was largely on the counsel, it is never too late for the court to exercise discretion and allow him to have his day in court. That the respondents can be compensated by way of costs or any loss, damage or inconvenience they may have suffered and the matter fixed for hearing and determination in the shortest time possible.

16. However, the respondents in response submissions dated 9th May 2025 argued that the trial court was justified in dismissing the applicant's application as the same lacked merit and was an afterthought. That the suit was dismissed in the year 2016 due to

the indolence of the appellant. Thereafter, the appellant waited roughly five (5) years and ten (10) months from the time the suit was dismissed before moving the court to reinstate the suit. That, the appellant did not bother explaining the delay in approaching the court to reinstate the suit.

17. The respondents relied on the case of, Stephen Gathua Kimani vs Nacny Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR where the Court stated that a delay of one (1) year in filing an application for review must be sufficiently explained.

18. The respondents further argue that the appellant took another two (2) years to prosecute the application for reinstatement showing the appellant's lack of interest in prosecuting the suit that equity does not aid the indolent.

19. The respondents further submitted that the trial court did not err in making its decision to dismiss the

application. That the reason provided for in the supporting affidavit dated 4th October 2021, that the appellant's advocate on record was not aware of that the matter was coming up in court on 6th December 2016 was misleading and untrue. That both parties advocates were served with a notice from the court dated 29th November 2016, indicating that the matter would be mentioned in open court on the 6th December 2016 when the appellant was required to show cause why the suit should not be dismissed. However, on the said date the appellant's advocate never appeared in court and the suit was dismissed.

20. The respondents referred the court to the case of *Fran Investment limited vs GAS Security Services Limited [2015] eKLR* where the Court held that Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice, as it uses the word "give notice" which may be done through its official

website or the cause list which constitutes sufficient notice.

21. The respondents further submitted that delay defeats equity and argued that the appellant was given an opportunity to file his written submissions but delayed in doing so, hence the trial court noted in paragraph 11 of its ruling that at the time of drafting the ruling the applicant was yet to file his written submissions.

22. Lastly, the respondents submitted that the trial court correctly held that the respondents were likely to suffer more prejudice than the appellant if the suit was reinstated. That the 1st respondent being a corporate company, it would be impossible for it to get witnesses to testify fourteen (14) years later as some of the witnesses, including the 2nd respondent, had already left the 1st respondent's employment and would therefore hinder the respondents' ability

to effectively defend the suit which would be highly prejudicial.

23. The respondents cited the case of Nyambura Gichango vs Gilbert Gathungu Kamande & another (2021) eKLR where the Court held that assuming the 1st defendant and his witnesses could be traced 19 years after the occurrence of the accident was highly imaginative and would be prejudicial and declined to reinstate the suit.

24. That the appellant having been lethargic and indolent in prosecuting his suit, there is no reason for the court to interfere with the trial court's finding and therefore the appeal lacks merit and should be dismissed with costs to the respondents.

25. Upon considering the appeal in the light of the materials placed before the court and in particular the reasons why the appellants notice of motion application dated 4th October 2021 was dismissed, I

note that the same was dismissed basically on three grounds namely: -

- a) *Inordinate delay in prosecuting the matter and insufficient reasons/explanation for the delay.*
- b) *The prejudice the respondent will suffer in tracing the witnesses after fourteen (14) years of occurrence of the accident.*
- c) *The appellant's failure to attend to a notice to show cause served upon him.*

26. As regards the first issue, it is not in dispute that, the accident herein occurred on 13th May 2008 as per the plaint dated 28th March 2011. Subsequently the matter was filed in court vide CMCC No. 182 of 2011 Kenneth Edwin's Ganda vs Masli Bus Co. Ltd & Peter Nguru in the year 2011. The court notes from the proceedings in the trial court that, the matter was active in court until 6th October 2015 when in

the absence of the parties, it was marked “stood over generally”

27. Notably even before that date, the parties were in active negotiation of the matter and at the same time the defendant sought for leave to enjoin a 3rd party. That indeed an interlocutory judgment was entered against the 3rd party on 15th April 2016.

28. As a result of the aforesaid, the matter was only dormant between 15th April 2016 to 6th December 2016, a period of eight (8) months.

29. At this point, it suffices to note from the trial court’s record that, the matter was dismissed on 6th December 2016 and not 6th December 2015 as stated in the notice of motion application dated 4th October 2021, and the impugned ruling.

30. That said, the question is, has the appellant offered adequate explanation for the delay. The appellant argued that he was unable to trace the court file for

a long time, but that allegation is unsubstantiated. Further that he was out of communication with his lawyer, again that explanation fails, as rightfully explained in the impugned ruling, he is the litigant not the lawyer, therefore he should have followed up on his own matter. This court therefore finds that there was delay of eight (8) months and the explanation for the same is unsatisfactory.

31. However, this court needs to go beyond the issue of delay and consider the other grounds which the trial court relied on to dismiss the subject application. The next issue was lack of witnesses or inability or difficulty the defence would face in tracing witnesses.

32. First and foremost, the respondents filed grounds of opposition to the application. Basically then they did not oppose the averments in the supporting affidavit and/or raised any factual matters.

Consequently, none of grounds of opposition raised the issue under consideration.

33. It suffices to note that the issue was raised in the respondents' submissions and not in the replying affidavit. To that extent, that reasoning by the court was erroneous as the court considered matters not properly placed before it. In any event, the statement of defence reveals that, the defence will be calling out one witness, Ali Nzaphula M'Mbetea, there is no evidence that he does not exist.

34. The other reason advanced by the trial court was appellant's failure to address notice to show cause issued. I have perused the trial court's proceedings, and I note that, after interlocutory judgment was entered against the 3rd party on 15th April 2016, there is no order on the court file for a "Notice to show cause" to the parties. The next order was issued on 6th December 2016 wherein the record

reveals that, both parties were absent and the court stated; “No appearance by either party, matter dismissed.”

35. Pursuant to that order, several question arise: Were the parties aware of the notice to show cause. Was it issued? Was it served upon the parties? Is there an affidavit of service? A perusal of the trial court’s proceeding, does not show any order for issuance of notice to show cause.

36. However, there is a notice to show cause dated 29th November 2016 on the court file, but there is no affidavit of service to show the appellant was aware of the same. Therefore, the finding of the trial court that, parties were notified of the notice to show cause is not supported by evidence. Moreover, the respondents who argue that notice to show cause was served was not even in court on the date the suit was dismissed.

37. Even if the suit was dismissed pursuant to the provisions of Order 17 Rule 2(1) Civil Procedure Rule 2010 which allows the court to dismiss a matter on its motion, it requires that the matter should have been dormant for a period of one (1) year, taking into account, the last order of the court was entry of judgment on 15th April 2016 and dismissal on 6th December 2016, the one-year period had not lapsed. In that case, that ground of notice to show cause fails.

38. Furthermore, as much as the defendant/respondent will suffer the plaintiff/applicant too will suffer prejudice if denied an opportunity to be heard. The plaintiff has pleaded to injuries sustained in the accident.

39. Further the parties had commenced negotiation to settle the matter and the third party proceeding commenced and interlocutory judgment entered.

Furthermore, the delay was of eight (8) months. Moreover, the defendants/respondents can be compensated by costs and matter proceeded on priority basis.

40. I therefore allow the application on the following conditions: -

a) The appellant to pay the respondents within 14 days of the date of this order throw away costs of Kshs 30,000 mainly due to delay in filing the application after dismissal of suit.

b) The matter be set down for hearing within twenty-one (21) days of the date of this order.

c) Failure to comply with afore orders, the order herein reinstating the suit will be vacated without further recourse to court.

d) Costs of this application is awarded to the respondent.

41. It is so ordered.

Dated, delivered and signed this 19th day of March
2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

N/A for the appellant

Ms. Stower H/B for Mr Bigi for the respondents

Ms. Hannah: court assistant